

05.16.12
12006

ADOPTED

**TOWN OF RIVERHEAD
COMMUNITY DEVELOPMENT AGENCY**

Resolution # 06

**AUTHORIZES THE CHAIRMAN TO EXECUTE AN AGREEMENT
WITH NEW YORK & ATLANTIC RAILWAY COMPANY
TO USE RAILROAD TRACK AND RAIL INFRASTRUCTURE
AT EPCAL AND CONDUCT FREIGHT RAIL OPERATIONS**

Councilman Dunleavy offered the following resolution,

which was seconded by Councilman Wooten

WHEREAS, on February 11, 2010, the Town Board adopted Resolution No. 111 entitled, "Awards Calverton Rail Access Rehabilitation Contract" that awarded the construction bid for the rehabilitation of the railroad track and rail infrastructure (the "subject track") at Calverton Enterprise Park above mentioned project to Railroad Construction Co., Inc.;

WHEREAS, the above mentioned project for the rehabilitation of the subject track at Calverton Enterprise Park has been completed and the Town of Riverhead Community Development Agency wishes to enter into an agreement for the operation of freight rail upon the subject track.

NOW, THEREFORE, BE IT RESOLVED, that the Chairman is hereby authorized to execute an Agreement with New York & Atlantic Rail in substantially the form attached hereto; and be it further

RESOLVED, that the Town Clerk is hereby directed to forward a copy of this resolution to Steven M. Polan, Esq., Manatt, Phelps & Phillips, LLP, 7 Times Square, New York, New York 10036; New York & Atlantic Railway Company, 68-01 Otto Road, Glendale, New York 11385; the Community Development Agency Director and the Town Attorney; and be it further

RESOLVED, that all Town Hall Departments may review and obtain a copy of this resolution from the electronic storage device and, if needed, a copy of same may be obtained from the Office of the Town Clerk.

THE VOTE

Giglio ☒ Yes ☐ No Gabrielsen ☒ Yes ☐ No
Wooten ☒ Yes ☐ No Dunleavy ☒ Yes ☐ No
Walter ☒ Yes ☐ No

The Resolution Was ☒ Thereupon Duly Declared Adopted

NEW YORK & ATLANTIC RAILWAY COMPANY
OPERATING AGREEMENT

This Operating Agreement ("**Agreement**"), made as of this ___th day of _____, 2012 (the "**Effective Date**"), by and between the **New York & Atlantic Railway Company**, located at 68-01 Otto Road, Glendale, NY 11385 ("**Railroad**"), and the **Town of Riverhead Community Development Agency** (the "**CDA**") and the **Town of Riverhead** (the "**Town**") with an office located at 200 Howell Avenue, Riverhead, NY 11901.

WHEREAS the Town has acquired certain easements for railroad purposes in the property called EPCAL, located in Suffolk County, New York (the "**Property**");

WHEREAS the CDA owns or leases, and the Town and the CDA desire to construct and rehabilitate the railroad track and rail infrastructure (as further described below, the "**Subject Track**") on the Property, that connects or will connect with the Long Island Rail Road ("**LIRR**") at or near milepost 63.6;

WHEREAS pursuant to the Transfer Agreement (the "**Transfer Agreement**") between LIRR and Southern Empire State Railroad Company (now called New York & Atlantic Railway), dated November 18, 1996, as amended, Railroad is the exclusive freight railroad operating on the LIRR and, therefore may conduct freight operations on the LIRR rail line at its connection with the Subject Track;

WHEREAS the Town, the CDA, and Railroad desire that the Subject Track be used for rail freight operations to enhance future development of the Property;

AND WHEREAS the parties have agreed that such Subject Track shall be subject to the terms, covenants and conditions hereinafter described.

NOW THEREFORE, the parties agree as follows:

ARTICLE 1 - DEFINITIONS

- 1.1 "**Clearance Point**" means the location near the switch where the Subject Track connects to the LIRR rail line at or about 14.5 feet from the center-line of the nearest track on the LIRR rail line.
- 1.2 "**Exhibit A**" means the insurance schedule marked Exhibit A that is attached hereto and which forms part of this Agreement.
- 1.3 "**Exhibit B**" means the plan marked Exhibit B that is attached hereto depicting the Subject Track and identifying Points A, B, and C and which forms part of this Agreement.
- 1.4 "**Exhibit C**" means the documents attached hereto evidencing the Town's and the CDA's real property rights and interests, public authority and permission, including applicable permits, necessary for the construction, maintenance and operation of the Subject Track.
- 1.5 "**FRA**" means the Federal Railroad Administration or any successor.
- 1.6 "**Hazardous Materials**" means (i) "hazardous substance" as defined under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.

Section 9601 *et seq.*, and any regulations promulgated thereunder, each as it may be in effect from time to time, (ii) “hazardous materials” as defined under the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801 *et seq.*, and any regulations promulgated thereunder, each as it may be in effect from time to time, (iii) “hazardous waste” as defined under New York Environmental Conservation Law Section 27-0901 *et seq.* and any regulations promulgated thereunder, each as it may be in effect from time to time, (iv) “hazardous substance” as defined under the Clean Water Act, 33 U.S.C. Section 1321 and any regulations promulgated thereunder, each as it may be in effect from time to time, (v) “Petroleum” as defined in N.Y. Environmental Conservation Law § 15.0514, and any regulations promulgated thereunder, each as it may be in effect from time to time, (vi) asbestos, (vii) polychlorinated biphenyls, and (viii) any other substance regulated by federal, state, local or other governmental statute, regulation, rule, law or ordinance dealing with the protection of human health, safety, natural resources or the environment now existing or hereafter enacted.

- 1.7 “**Point A**” identifies the beginning of the Subject Track at the point of the switch on the LIRR rail line.
- 1.6 “**Point B**” identifies the Clearance Point from the switch on the LIRR rail line.
- 1.7 “**Point C**” identifies the end of the Subject Track.
- 1.8 “**Subject Track**” means the entire track or tracks which comprise the Subject Track (Points A and C identify the extreme limits) and includes turnouts, track, Track Materials, ballast, sub-ballast, crossing materials, crossing protection apparatus, signals, circuitry, fencing, structures such as culverts, bridges and retaining walls, land improvements or alterations required to accommodate the track such as cuts, embankments and ditches, and the land occupied and required to accommodate all the features of the Subject Track including the foregoing to the extent of the Town’s and the CDA’s interest therein pursuant to the documents attached hereto as Exhibit C.
- 1.9 “**Track Materials**” means and includes rails, rail anchors, fastenings, spikes, switch materials, derails, bumping posts, the plates and track and switch ties.

ARTICLE 2 - PROVISION OF SUBJECT TRACK AND SECURING OF RIGHT OF WAY

- 2.1 The Town and the CDA grant to the Railroad the right to operate on the Subject Track in accordance with the terms set forth in this Agreement. Each of the Town and the CDA represents that it has no knowledge of any fact or circumstance that would impair such party’s rights granted pursuant to the documents attached hereto as Exhibit C with respect to the Subject Track.
- 2.2 Each of the Town and the CDA represents that, except as set forth on Exhibit C, it has no knowledge of any fact or circumstance that would impair such party’s rights granted pursuant to the documents attached hereto as Exhibit C with respect to the ability of additional customers to connect to the Subject Track, and each of the Town and the CDA shall diligently make good faith efforts to maintain or acquire any such rights necessary to allow said connections to the Subject Track, provided that such efforts shall be at no cost or expense to such party.

- 2.3 In the event that, in the reasonable opinion of Railroad, such rights as conveyed to Railroad pursuant to this Agreement are not sufficient for Railroad to conduct rail freight operations on the Subject Track or for the ability of additional customers to connect to the Subject Track, Railroad shall provide written notice of same to the Town and the CDA, and the Town and/or the CDA may, in each such party's sole discretion, elect to remedy such conditions at its expense. In the event the Town and the CDA elect not to remedy such conditions, Railroad may, as its sole remedy (but without limiting any remedies Railroad may have with respect to any breach by the Town or the CDA of this Agreement), terminate this Agreement upon thirty (30) days prior written notice to the Town and the CDA.
- 2.4 Except to the extent such obligation is expressly assumed by Railroad hereunder, the Town and the CDA shall strictly comply with all laws, statutes, regulations, ordinances, orders, covenants, restrictions, or decisions of any court of competent jurisdiction (collectively, "**Laws**"), including, without limitation, those pertaining to environmental matters relating to the ownership of the Subject Track.
- 2.5 If any roadway within the Property is or will be crossed or otherwise affected by the Subject Track, the CDA shall be responsible for securing the approval of the party or agency with jurisdiction and for any improvements required in connection with such approval.
- 2.6 The CDA and the Town shall have sole responsibility for the maintenance and repair of the pedestrian crossing located between Point B and River Road. Except to the extent caused by Railroad's negligence or wilful misconduct, the CDA and the Town shall be solely liable for any claims, demands, awards, actions and proceedings by whomsoever made, brought or prosecuted, for injuries, as well as those resulting in death, or for damage to or destruction of third party property arising from the use of the crossing.
- 2.7 Except as set forth in this Article 2 and Section 3.1, Railroad acknowledges and agrees that the Subject Track is being delivered hereunder on an "as is/where is" basis, subject to Railroad's acceptance pursuant to Section 3.2.

ARTICLE 3 – CONSTRUCTION, MAINTENANCE AND OWNERSHIP

- 3.1 The CDA and the Town, at their own expense, shall complete the following work:
- a) necessary and appropriate grading and drainage for the Subject Track;
 - b) rehabilitation of the Subject Track to FRA Class I standards; and
 - c) furnish routine inspections on an ongoing basis of any active warning devices (*i.e.*, crossing signals) present at the Subject Track. Additionally, the CDA and the Town will be responsible to respond to any grade crossing active warning device failures that may occur. Any work required to be performed on the active warning devices shall be done by the CDA or the Town at the CDA's own expense.
- 3.2 The CDA shall provide Railroad with written notice of the CDA's completion of the work identified in Section 3.1 (a and b), and Railroad shall have the right to inspect such work within thirty (30) days after the receipt of such notice. Within thirty (30) days following such thirty (30) day inspection period, Railroad shall provide the Town and the

CDA with written notice advising whether Railroad accepts the Subject Track as industrial trackage as is, or detailing the reasons why the CDA's work is not acceptable. The Town and/or the CDA may, in each such party's sole discretion, elect to remedy such conditions at its expense and provide Railroad with written notice of its completion thereof. Railroad shall have the right to re-inspect such work within thirty (30) days after the receipt of such notice, and shall provide the Town and the CDA with written notice of Railroad's acceptance or rejection of the work within thirty (30) days following such thirty (30) day re-inspection period. In the event the Town and the CDA elect not to perform any work described in this Section 3.2, Railroad may, as its sole remedy (but without limiting any remedies Railroad may have with respect to any breach by the Town or the CDA of this Agreement), terminate this Agreement upon thirty (30) days prior written notice to the Town and the CDA.

- 3.3 Upon Railroad's acceptance of the Subject Track pursuant to Section 3.2, but subject to the terms and conditions of Section 3.4, Railroad shall maintain the Subject Track in good repair and condition to FRA Class I standards and in accordance with applicable FRA regulations as required to ensure good and safe operation on the Subject Track without charge to the Town or the CDA.
- 3.4 Railroad acknowledges and agrees that the Town and the CDA have not made any representations or assurances with respect to the volume of business that Railroad will or may have in the exercise of the rights granted herein during the term of this Agreement. Notwithstanding the foregoing, if Railroad determines in its sole discretion that after a period of three (3) years the volume of freight rail traffic on the Subject Track or on privately owned industry tracks which connect to the Subject Track is insufficient for its business purposes, Railroad may, as its sole remedy (but without limiting any remedies Railroad may have with respect to any breach by the Town or the CDA of this Agreement), terminate this Agreement upon thirty (30) days prior written notice to the Town and the CDA. In the event the Agreement is terminated pursuant to this Section 3.4, the CDA shall indemnify the reasonable out-of-pocket costs and expenses incurred by Railroad in defending against a complaint of a customer receiving service from the Railroad on the Subject Track to the Surface Transportation Board, provided and solely to the extent that such complaint directly concerns the Railroad's failure to provide common carrier service due to the Railroad's termination of this Agreement pursuant to this Section 3.4. Such indemnification obligation shall be subject to and conditioned upon the Railroad including in all contracts or agreements for service on the Subject Track an express waiver by the customer of any complaint, claim, or other action for specific performance, costs, expenses, damages, or any other remedy (including without limitation any remedy that might otherwise be available by order of the Surface Transportation Board) on account of Railroad's failure to provide common carrier service due to termination of this Agreement.
- 3.5 The CDA shall own the Subject Track subject to the operating rights of Railroad granted herein. The Town and the CDA shall not assess any taxes on Railroad on account of Railroad's rights as an operator of the Subject Track pursuant to this Agreement. In the event any taxes or assessments are lawfully levied or assessed by any other public authority against the Subject Track, the Town, the CDA, and Railroad shall confer regarding a mutually

acceptable allocation of such taxes or assessments as between the parties, and if the parties are unable to determine a mutually acceptable allocation, then either party may, as its sole remedy (but without limiting any remedies such party may have with respect to any breach by the other party of this Agreement), terminate this Agreement upon thirty (30) days prior written notice to the other party.

ARTICLE 4 - ALTERATIONS

- 4.1 Should LIRR make such changes in the track to which the Subject Track connects, in railway structures or facilities, or in the characteristics of the engines and other equipment to be operated on the Subject Track, as would in the reasonable opinion of Railroad necessitate the moving, alteration or strengthening of the Subject Track in whole or in part, or should orders or regulations issued by the FRA, Surface Transportation Board or other authority having jurisdiction in relation thereto necessitate the moving, alteration or strengthening of the Subject Track in whole or in part, Railroad shall provide reasonably detailed written notice to the Town and the CDA, and the Town and/or the CDA may, in each such party's sole discretion, elect to perform such work at its expense and under the supervision of Railroad. In the event the Town and the CDA elect not to perform such work, Railroad may, as its sole remedy (but without limiting any remedies Railroad may have with respect to any breach by the Town or the CDA of this Agreement), terminate this Agreement upon thirty (30) days prior written notice to the Town and the CDA.
- 4.2 Railroad shall not make modifications to the Subject Track or the Property without the prior written approval of the Town and the CDA, which shall not be unreasonably withheld.

ARTICLE 5 - USE

- 5.1 Railroad shall have the exclusive right, free of charge, to use the Subject Track for railway purposes and the movement of freight, subject to the terms and conditions of this Agreement, and in accordance with the rules and regulations of LIRR and applicable Laws. Railroad shall provide rail service to customers consistent with Railroad's obligations pursuant to 49 U.S.C. section 10741 and other applicable regulations and requirements of the Surface Transportation Board. Notwithstanding anything to the contrary set forth herein, Railroad shall not assert that the jurisdiction of the Surface Transportation Board, if any, extends to pre-empt any land use or zoning Laws applicable to the Subject Track and/or the Property.

ARTICLE 6 - CLEARANCES

- 6.1 The Town and the CDA shall, in the provision or alteration (if any) by or on behalf of the Town or the CDA of the Subject Track and of any building or other structure erected or to be erected by or on behalf of the Town or the CDA over the Subject Track or on adjoining lands, observe and fully comply with all the Laws and engineering standards in force, as amended from time to time, or which may hereafter come into force relating to railways, industry tracks or private sidings or buildings or structures over industry tracks or adjacent thereto. Neither the Town nor the CDA shall approve, to the extent such party has approval authority, of (a) any vertical structures proposed to be erected within

10 feet of the centerline of rail or (b) horizontal structures less than regulatory height (currently 22.5 feet).

- 6.2 The Town and/or the CDA, as applicable, shall notify Railroad in advance, in writing, if a building or structure to be constructed by or on behalf of such party, and any other building or structure for which such party's approval has been sought, over or beside the Subject Track will encroach within clearance requirements (such encroachment will be deemed to create "**Restricted Clearance**"), and shall submit to Railroad for review and approval, which shall not be unreasonably withheld or delayed, detailed plans and designs stamped by a Professional Engineer as well as detailed information regarding the reasons for less than standard clearance, operations over the trackage and any other information that Railroad may reasonably require in connection with such construction by or on behalf of the Town and/or the CDA. Any Restricted Clearance in connection with such construction by or on behalf of the Town and/or the CDA or for which the such party's approval has been sought must be approved by Railroad, and, in the interest of safety, Railroad, in its reasonable discretion and as a condition to granting its approval, may require modifications to such plans and designs to minimize any such Restricted Clearance.
- 6.3 The Town and the CDA shall be responsible for providing, installing and maintaining signage (a) regarding any Restricted Clearance in connection with any building or structure to be constructed by or on behalf of the Town or the CDA and any other building or structure for which such party's approval has been sought, (b) at a location no more than 200 feet from each rail approach to any such Restricted Clearance location, and (c) on the Property at or near Point A of the Subject Track. In the event that the Town and the CDA fail to install and/or maintain such signage, Railroad may provide, install or replace the signage at the cost and expense of the Town and the CDA; however, Railroad shall not be obligated or responsible to provide, install or maintain same.

ARTICLE 7 - LIABILITY

- 7.1 Except to the extent caused by the negligence or wilful misconduct of the Town and/or the CDA, and as provided in Section 2.6 herein, Railroad shall defend, indemnify and save harmless the Town and the CDA, all of its respective directors, officers, agents, and employees, and insurers:
- a) from and against any and all claims, demands, awards, actions and proceedings by whomsoever made, brought or prosecuted, and
 - b) from and against any and all loss, damages or expenses, including attorney's fees, suffered or incurred by the Town and/or the CDA including injuries, as well as those resulting in death, damage to or destruction of third party property, and claims related to the release of Hazardous Materials;

which are caused by Railroad's operations on the Subject Track or Railroad's non-compliance with any of the provisions of this Agreement.

- 7.2 Except to the extent caused by Railroad's negligence or wilful misconduct, the CDA shall defend, indemnify and save harmless Railroad from and against any and all loss, damages or expenses, including attorney's fees, suffered or incurred by Railroad including injuries,

as well as those resulting in death, damage to or destruction of third party property arising from claims related to the release of Hazardous Materials on or about the Subject Track (a) prior to the date of this Agreement and (b) that are caused by the Town and/or the CDA on or after the date of this Agreement.

- 7.3 Each party shall indemnify the other party for such party's respective liability pursuant to Section 2.6.
- 7.4 The CDA shall defend, indemnify and save harmless Railroad from and against any taxes or local improvements assessed by the Town or the CDA with respect to the Subject Track.
- 7.5 In the event of any discharge, disposal, or release of any Hazardous Materials at, upon, under, onto, within, or from the Property or the Subject Track in connection with Railroad's operations on the Subject Track, Railroad shall promptly (and in any case within five (5) days after Railroad first becomes aware of same or any shorter period imposed by applicable Law) perform or cause to be performed any and all necessary and appropriate actions with respect to such Hazardous Materials including, without limitation, any remediation, notification, and reporting requirements pursuant to applicable environmental Laws; provided, however, that if such action is not susceptible to completion within the time periods set forth herein, Railroad shall commence such performance within such time period and thereafter diligently and continuously pursue its completion. If Railroad fails to perform (or commence performance of, as appropriate) any such actions within the time periods set forth herein, the Town and the CDA shall have the right (but not the obligation), at Railroad's cost, to perform any and all actions as the Town and/or the CDA shall reasonably deem necessary or appropriate with respect to such Hazardous Materials. Notwithstanding the foregoing, Railroad shall not take any remedial action in response to the presence of any Hazardous Materials at, upon, under, onto, within, or from the Property or the Subject Track or enter into any settlement agreement, consent, decree or other compromise in respect to any claims relating to or in any way connected with the Property or the Subject Track without first notifying the Town and the CDA of Railroad's intention to do so and affording the Town and the CDA ample opportunity to appear, intervene or otherwise appropriately assert and protect its interest with respect thereto. Railroad shall also provide to the Town and the CDA, as promptly as possible, and in any event within five (5) days after Railroad first receives or sends the same, copies of all claims, reports, complaints, notices, warnings or asserted violations with respect to Hazardous Materials and relating in any way to the Property or the Subject Track or Railroad's use thereof.
- 7.6 For purposes of this Section 7, "Railroad" shall mean Railroad, its parents and corporate affiliates, and each of their officers, directors, employees, agents and insurers.
- 7.7 The provisions of Section 7 shall survive the termination of this Agreement.

ARTICLE 8 - INSURANCE

- 8.1 Railroad agrees to maintain the insurance coverage set out in Exhibit A.

ARTICLE 9 – TERM AND TERMINATION

- 9.1 This Agreement shall commence on the Effective Date and, subject to earlier termination pursuant to the terms and conditions of this Agreement, continue for an initial term of five (5) years and, thereafter, shall automatically renew for one additional five (5) year term unless either party provides the other party with notice of its intent not to renew this Agreement at least thirty (30) days prior to the expiration of the term.
- 9.2 If either party is in breach of any term of this Agreement then that party shall be in default under this Agreement. Should such default occur, either party may terminate this Agreement, after giving written notice thereof to the other party and allowing thirty (30) days to elapse after such notice, unless in the meantime such default shall have been remedied.
- 9.3 If Railroad ceases to be the exclusive freight rail operator on LIRR, then the Town and/or the CDA may terminate this Agreement upon thirty (30) days prior written notice to Railroad.

ARTICLE 10 - ASSIGNMENT

- 10.1 Neither party may assign the Agreement or its rights and obligations under this Agreement without the other party's prior written consent, which shall not be unreasonably withheld.

ARTICLE 11 - NOTICE

- 11.1 All notices or communications required hereunder shall be given by courier or facsimile, or if mailed by registered mail, postage prepaid, and addressed to the other party as follows:

To Railroad: New York & Atlantic Railway Company
68-01 Otto Road
Glendale, NY 11385
Facsimile number: 718-497-3364

To Town and CDA: Town Supervisor
Town of Riverhead
200 Howell Avenue
Riverhead, NY 11901

Town Attorney
Town of Riverhead
200 Howell Avenue
Riverhead, NY 11901

Chris Kempner
Town of Riverhead Community Development Agency
200 Howell Avenue
Riverhead, NY 11901

or such other address as may be furnished from time to time by either party. Any notice, if delivered by courier or facsimile, shall be deemed to have been given or made on the date delivered or the date that a confirmation of receipt of the facsimile was recorded by the sender and if mailed correctly, shall be deemed to have been received on the third (3rd) business day after mailing. In the event of an actual or imminent disruption in postal service, any notice shall be delivered by courier.

ARTICLE 12 – FORCE MAJEURE

- 12.1 In the event that a party is unable to meet its obligations under this Agreement as a result of force majeure occurrences (including, without limitations, floods, earthquakes, natural disasters, civil disturbances, acts of government, war, terrorism, strike or other labor unrest or any other cause beyond such party's reasonable control), the obligations of the party affected by the force majeure occurrence shall be suspended for the duration of the same; provided, however, that the parties shall make all reasonable efforts to continue to meet their respective obligations for the duration of the force majeure condition and shall promptly notify the other party of the existence of the condition causing its inability to meet any obligation under the Agreement. The suspension of any obligations owing to force majeure shall neither cause the term of this Agreement to be extended nor affect any rights or liabilities accrued under this Agreement prior to the force majeure condition.
- 12.2 In the event that a force majeure occurrence substantially destroys all or a portion of the Subject Track, the parties shall meet to determine whether the Subject Track shall be rebuilt and agree to equitably apportion the cost thereof between the CDA and Railroad. In the event that the parties cannot agree, either party may terminate this Agreement on thirty (30) days written notice.

ARTICLE 13- MISCELLANEOUS

- 13.1 Each of the Town and the CDA shall, at its own expense, comply with all applicable Laws, including without limitation, applicable environmental Laws. Railroad shall at its own expense comply with all applicable Laws, including without limitation, applicable environmental Laws and Laws regarding the operations and maintenance of railroads and railroad property.
- 13.2 Termination of this Agreement for any reason, including default, shall not release the parties from any obligations or liabilities incurred during the continuance of this Agreement.
- 13.3 This Agreement shall enure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.
- 13.4 This Agreement shall be construed in accordance with the domestic laws of the State of New York, without giving effect to any choice or conflict of laws provision or rule (whether of the State of New York or any other jurisdiction) that would cause the application of laws of any jurisdiction other than the State of New York.
- 13.5 This Agreement may not be modified or amended except in writing signed by the parties.

- 13.6 No term, covenant or provision in this Agreement or right hereunder or in respect hereof will be deemed to have been waived by either party, except by express waiver in writing signed by such party.
- 13.7 The headings and numbering introducing sections in this Agreement are inserted for convenience only and in no way define or construe the scope or intent of such section.
- 13.8 This Agreement contains the entire agreement of the parties with respect to the Subject Track and supersedes and cancels all prior agreements and understandings, oral or written, with respect thereto.
- 13.9 The language used in this Agreement should be deemed the language chosen by the parties hereto to express their mutual intent, and no rule of strict construction shall be applied against any party.

(Signature page follows.)

The parties hereto have executed this Agreement on the date first above written.

NEW YORK & ATLANTIC RAILWAY COMPANY

By: _____

Title: _____

Date: _____

THE TOWN OF RIVERHEAD

By: _____

Title: _____

Date: _____

THE TOWN OF RIVERHEAD COMMUNITY DEVELOPMENT AGENCY

By: _____

Title: _____

Date: _____

EXHIBIT A – INSURANCE

1. Railroad shall at its own cost and expense, take out and keep in full force and effect a Commercial General Liability Insurance policy with an inclusive limit of not less than \$10,000,000 per occurrence for bodily injury, including death, personal injury and property damage and destruction. Such insurance shall specifically state by its wording or by endorsement:
 - (a) the policy shall name the Town as an additional insured;
 - (b) the policy shall contain a “cross-liability” clause which shall have the effect of insuring each person firm or corporation insured thereunder in the same manner and to the same extent as if a separate policy had been insured to each;
 - (c) the policy shall not be cancelled unless written notice is given by Railroad to the Town thirty (30) days before the effective date of such cancellation; and
 - (d) the policy shall be written by a reputable insurance company with a current Best's Guide Rating of A- and Class VII or better, and authorized to do business in the state(s) in which the service is to be provided.
2. If Railroad is loading or unloading Hazardous Substances on the Subject Track, Railroad shall maintain a Commercial General Liability Insurance policy with an inclusive limit of not less than \$10,000,000 per occurrence for bodily injury and property damage, and in addition to meeting the requirements in Section 1(a) through (d), it shall extend to cover sudden and accidental discharge or release of Hazardous Substances.
3. Railroad shall, prior to the effective date of this Agreement, and upon the insurance renewal date thereafter, furnish to the Town Certificates of Insurance evidencing the above coverages.
4. If any obligations of Railroad are to be subcontracted, Railroad shall require that the subcontractor provide and maintain insurance coverage as set forth herein.

EXHIBIT B – PLAN SHEET

EXHIBIT C –REAL PROPERTY DOCUMENTS

05.16.12
12007

ADOPTED

**TOWN OF RIVERHEAD
COMMUNITY DEVELOPMENT AGENCY**

Resolution # 07

**AUTHORIZES THE CHAIRMAN TO EXECUTE A LICENSE AGREEMENT
WITH NORTH SIX, INC.**

Councilman Wooten offered the following resolution,

which was seconded by Councilman Gabrielsen

NOW THEREFORE BE IT RESOLVED that the Town Board of the Town of Riverhead hereby authorizes the Chairman to execute a License Agreement (copy attached herewith) between the Town of Riverhead Community Development Agency and North Six, Inc. in connection with the utilization of a portion of Town of Riverhead-Enterprise Park at Calverton Western Runway/Taxiway, Grumman Boulevard/River Road, Calverton for filming on May 20, 2012; and be it further

RESOLVED, that the Town Clerk is hereby directed to forward a copy of this resolution to North Six, Inc. 324 Lafayette Street, 7th Floor, New York, New York 10012; and be it further

RESOLVED, that all Town Hall Departments may review and obtain a copy of this resolution from the electronic storage device and, if needed, a copy of same may be obtained from the Office of the Town Clerk.

THE VOTE

Giglio	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No	Gabrielsen	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Wooten	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No	Dunleavy	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
			Walter	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No

The Resolution Was ☒ Thereupon Duly Declared Adopted

LICENSE AGREEMENT

This Contract is made and entered into as of this ____ day of May, 2012, by and between **North Six, Inc.**, a corporation existing under the laws of the State of _____, having a place of business at 324 Lafayette Street, 7th Floor, New York, New York 10012 and the **Town of Riverhead Community Development**, a urban renewal agency, with offices located at 200 Howell Avenue, Town of Riverhead, County of Suffolk and State of New York:

WHEREAS, the Town of Riverhead Community Development Agency currently owns approximately 2,124.319 +/- acres at Enterprise Park at Calverton; and

WHEREAS, North Six, Inc. wishes to utilize specified locations located with the Town of Riverhead Community Development Agency for the purposes of videotaping for a film production; and

WHEREAS, the Town of Riverhead Community Development Agency has agreed to permit the utilization for said production at the Western Runway/Taxiway at Enterprise Park at Calverton; and

WHEREAS, North Six, Inc. and the Town of Riverhead Community Development Agency have agreed to terms and conditions under which North Six, Inc. will be granted the use of said location.

NOW THEREFORE, in consideration of the mutual covenants hereinafter set forth, the parties agree as follows:

1. Use of Property: The Town hereby grants North Six, Inc. permission

to utilize the Western Runway/Taxiway at Enterprise Park at Calverton on May 20, 2012 for the aforementioned purposes.

2. Cleanup: North Six, Inc. agrees to provide cleanup and removal of any debris or props deposited by reason of its actions in connection with the Agreement.
3. Compliance With Laws: North Six, Inc., agrees at all times to comply with all applicable federal, state, county and municipal laws, regulations, ordinances, codes and restrictions, including, without limitation, compliance with Article 28 of the New York State Tax Law and applicable regulations thereunder, and will secure any and all permits or licenses required for its activities and operations carried out at the locations.
4. Compensation: In exchange for License set forth above for the use of the aforementioned location, North Six, Inc. will pay the Town of Riverhead Community Development Agency a license fee in the amount of \$400.00. All sums payable by North Six, Inc. under this Agreement shall be made on or before May 18, 2012.
5. Responsibilities of North Six, Inc.: Subject to the terms of this Agreement, North Six, Inc. will be responsible for carrying out and shall have exclusive control of all operations associated with the Event and related activities, including without limitation, and shall diligently and continuously engage in such cleanup efforts so that the cleanup will be accomplished as soon as reasonably practicable (but in no event later than two days thereafter). All locations will be restored to the condition that existed prior to the Event (hereafter, the "restoration") and be

completely clean and free of clutter and debris.

6. Insurance and Indemnification: North Six, Inc. will be responsible for providing comprehensive general liability insurance in the amount of not less than \$2,000,000 and automobile liability insurance coverage of not less than \$2,000,000.00 with a company or companies reasonably satisfactory to the Town of Riverhead Community Development Agency. North Six, Inc. shall provide certificates of the foregoing insurance, showing the Town of Riverhead Community Development Agency as an additional insured to the extent of their interest. Finally, North Six, Inc. agrees to indemnify and hold harmless the Town of Riverhead and their respective officers, employees, agents, representatives and officials from any and all loss or liability associated with the Events and related activities described herein, including liability for damages to property or for injuries or death to persons which may arise from, or be attributable or incident to the use by North Six, Inc., and its employees, agents, representatives and concessionaires, of the aforementioned. With respect to any suit or claim by the Town of Riverhead Community Development Agency, whether under this indemnification provision or otherwise, North Six, Inc. for itself, its agents, employees and representatives, hereby expressly waives any defense which might preclude or limit either enforcement of this indemnification clause or any reasonable attorneys fees incurred by the Town securing compliance with the provision of this indemnification agreement.

7. Successors and Assigns. This agreement shall be binding upon and inure to the benefit of the respective successors and assigns of the parties; provided, however, that nothing herein shall be deemed to permit the

assignment of this Agreement by either party without the express written consent of the other party.

8. Entire Agreement. This contract constitutes the entire agreement between the parties and no further agreement, express or implied, written or oral, exists with respect to the subject matter of this document.

9. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of New York.

IN WITNESS WHEREOF, North Six, Inc. has caused this instrument to be signed in its corporate name and the Town of Riverhead Community Development Agency has caused this instrument to be signed in its municipal name, hereunto duly authorized, as of the day and the year first above written.

NORTH SIX, INC.

By:_____

TOWN OF RIVERHEAD COMMUNITY
DEVELOPMENT AGENCY

By:_____
Sean M. Walter, Chairman

**TOWN OF RIVERHEAD
COMMUNITY DEVELOPMENT AGENCY**

Resolution # 08

**A RESOLUTION CALLING A PUBLIC HEARING ON THE COMMUNITY
DEVELOPMENT AGENCY'S DESIGNATION OF YMCA of Long Island, Inc.
AS A QUALIFIED AND ELIGIBLE SPONSOR FOR THE LEASE, PURCHASE AND
DEVELOPMENT OF APPROXIMATELY 7.3 ACRES LOCATED WITHIN THE
PREMISES KNOWN AS THE ENTERPRISE PART AT CALVERTON (EPCAL),
CONSISTENT WITH THE GOALS AND OBJECTIVES OF THE
CALVERTON ENTERPRISE PARK URBAN RENEWAL PLAN (1998)**

Councilman Gabrielsen offered the following resolution,

which was seconded by Councilwoman Giglio

WHEREAS, the Town of Riverhead Community Development Agency owns, among other properties at the Enterprise Park at Calverton, some 2900 acres of property located south of Route 25, Calverton, New York; and

WHEREAS, YMCA of Long Island, Inc. (hereinafter "YMCA") has submitted to the Community Development Agency (the "Agency") a proposal for the redevelopment of the approximately 7.3 acres of property for construction and operation of a neighborhood youth center; and

WHEREAS, the Agency is considering designating YMCA of Long Island, Inc., a 501(c)(3) nonprofit community-based service organization dedicated to improving the quality of life of children, adults and families through programs focusing on youth development, health and social well being said corporation duly incorporated in the State of New York, as the "qualified and eligible sponsor (the "Sponsor"), pursuant to Section 507 (2) (d) of the General Municipal Law and in accordance with the established rules and procedures of the Agency; and

WHEREAS, the Agency is considering a lease agreement and transfer of title of the leased property upon approval of the EPCAL Reuse Plan and completion of the subdivision implemented as part of the Reuse Plan to approximately seven +/- acres of land within EPCAL, designated as lot 22 on the proposed subdivision map prepared by VHB and presented to the Town Board for approval on April 19, 2012, in order to facilitate this urban renewal project pursuant to a certain Agreement by and between the Town and YMCA, a copy of which shall be filed with the Office of the Town Clerk of the Town of Riverhead on June 19, 2012, and will be available for public inspection during regular business hours, which Agreement provides for the transfer of title to the YMCA of approximately 7.3 acres of land subject to: redevelopment as a youth center with a reverter clause in favor of the Community Development Agency of the Town of Riverhead; YMCA

to bear all costs of required improvements, including but not limited to water and sewer ; compliance with all conditions of the EPCAL Reuse Plan and provisions, conditions, restrictions of the subdivision plan implemented as part of the EPCAL Reuse Plan; compliance with all Town zoning and building codes; YMCA dedication of \$25,000.00 per year to Riverhead residents deemed eligible for financial assistance to defray membership costs; quarterly vocational classes free of charge to all Riverhead residents; and, bimonthly recreational youth/young adult programs to Riverhead residents free of charge; and

WHEREAS, Section 507(2)(d) of the General Municipal Law requires that a public hearing, following at least ten (10) days public notice, be held by the Agency on the question of designating YMCA the Sponsor for the redevelopment of the aforesaid properties; and

WHEREAS, the Agency now desires to call a public hearing on the designation of YMCA as the Sponsor for the redevelopment of and the transfer of the Town owned or to be owned portions of the property;

NOW, THEREFORE BE IT RESOLVED, A public hearing will be held before the Town Board of Riverhead, located at held at Riverhead Town Hall, 200 Howell Avenue, Riverhead, New York, on July 17, 2012 at 7:05 p.m., prevailing time, on the question of designating YMCA, the Sponsor for the redevelopment of the approximately 7.3 acres of property located in EPCAL south of Route 25, Calverton, New York, consistent with the Calverton Enterprise Park Urban Renewal Plan (1998), and to hear all persons interested in the subject thereof, concerning the same, and to take such action thereon as is required or authorized by law; and it is further

RESOLVED, that the Town Clerk is hereby directed to publish the attached notice of public hearing once in the June 21, 2012 edition of the *News Review*, the newspaper hereby designated as the official newspaper for this purpose and one having general circulation in and available to residents to the Town. Such publication shall be made no less than ten (10) days before the date designated for the public hearing. The Clerk is further authorized and directed to cause a copy of such notice of public hearing to be posted in such places as she deems appropriate under the circumstances, such posting to be done not less than ten (10) days before the date designated for the public hearing; and it is further

RESOLVED, that the Town Clerk is hereby directed to forward a certified copy of this resolution and attached notice to Smith, Finkelstein, Lundberg, Isler & Yakaboski, LLP., 456 Griffing Avenue, Riverhead, New York 11901, Michael T. Famigietti, 121 Dosoris Lane, Glen Cove, NY 11542; Christine Kempner, Director of the Community Development Agency, and Robert F. Kozakiewicz, Esq., Town Attorney.

THIS RESOLUTION HAS BEEN PREPARED BY FRANK A. ISLER, SPECIAL COUNSEL.

THE VOTE

Giglio ☒ Yes ☐ No Gabrielsen ☒ Yes ☐ No
Wooten ☒ Yes ☐ No Dunleavy ☒ Yes ☐ No
Walter ☒ Yes ☐ No

The Resolution Was ☒ Thereupon Duly Declared Adopted

Notice of Public Hearing
Town of Riverhead Community Development Agency
Town of Riverhead, Suffolk County, New York

NOTICE IS HEREBY GIVEN, that the Town of Riverhead Community Development Agency, Town of Riverhead, Suffolk County, New York (the "Agency") will hold a public hearing before the Town Board of Riverhead, located at held at Riverhead Town Hall, 200 Howell Avenue, Riverhead, New York, on July 17, 2012 at 7:05 p.m, prevailing time, pursuant to General Municipal Law 507(2)(d) for the purpose of considering whether the YMCA should be designated the "qualified and eligible sponsor" for the redevelopment of approximately 7.3 acres of the EPCAL site located within EPCAL and whether the portion of said property currently owned by the Town of Riverhead Community Development Agency should be leased to and thereafter transfer of title of the leased property upon approval of the EPCAL Reuse Plan and completion of the subdivision implemented as part of the Reuse Plan to the YMCA pursuant to a certain agreement between the Agency and YMCA, which agreement is on file in the office of the Town Clerk of the Town of Riverhead and is available for public inspection during regular business hours in exchange for and conditioned upon redevelopment as a youth center with a reverter clause in favor of the Community Development Agency of the Town of Riverhead; YMCA to bear all costs of required improvements, including but not limited to water and sewer ; compliance with all conditions of the EPCAL Reuse Plan and provisions, conditions, restrictions of the subdivision plan implemented as part of the EPCAL Reuse Plan; compliance with all Town zoning and building codes; YMCA dedication of \$25,000.00 per year to Riverhead residents deemed eligible for financial assistance to defray membership costs; quarterly vocational classes free of charge to all Riverhead residents; and, bimonthly recreational youth/young adult programs to Riverhead residents free of charge, consistent with the goals and objectives of the Calverton Enterprise Park Urban Renewal Plan (1998).

At said public hearing, the Community Development Agency will hear all persons interested in the subject matter thereof.

Dated:Riverhead, New York
May 16, 2012

BY ORDER OF THE TOWN BOARD OF THE
TOWN OF RIVERHEAD AS THE GOVERNING
BODY OF THE TOWN OF RIVERHEAD
COMMUNITY DEVELOPMENT AGENCY.

Diane Wilhelm, Town Clerk